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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

AMCOBEAUTY CORPORATION, Plaintiff, Cross-defendant and Appellant, v. ARMSTRONG MCCALL L.P., Defendant, Cross-complainant and Respondent; SD HAIR, LTD., Defendant and Respondent.	D054249 (Super. Ct. No. 37-2008-00091713-CU-BC-CTL)

APPEAL from orders of the Superior Court of San Diego County, Jay M. Bloom, Judge. Order denying plaintiff's motion for a preliminary injunction affirmed. Order granting defendant Armstrong McCall LP's motion for a preliminary injunction affirmed as modified.

I.

INTRODUCTION

Plaintiff AMCOBeauty Corporation (AMCO) appeals from two orders of the trial court. AMCO challenges the trial court's denial of its motion for a preliminary injunction against defendant and cross-complainant Armstrong McCall, L.P. (Armstrong McCall) and defendant SD Hair, Ltd. (SD Hair), and also challenges the trial court's granting of Armstrong McCall's motion for a preliminary injunction against AMCO.

Prior to August 2008, AMCO was an Armstrong McCall franchisee, and was the exclusive distributor of Armstrong McCall products in two San Diego sales territories. The relationship between the two companies soured, and in the summer of 2008 ─ when AMCO's franchise agreements were set to expire ─ a number of events occurred that form the basis of this lawsuit. However, it appears to be undisputed that Armstrong McCall ultimately unilaterally terminated AMCO's franchises.

AMCO filed suit against Armstrong and a number of other defendants, alleging an intricate and complex history of attempts by the defendants to dilute the value of AMCO's franchises through a variety of means, including product diversion, and the improper acquisition and control of Armstrong McCall, and its exclusive licensing rights, by other corporations. AMCO also filed a motion for a preliminary injunction in which it requested that the trial court enjoin Armstrong McCall and SD Hair from using AMCO's customer list and/or contacting AMCO's clients to tell them that SD Hair would be filling any new orders for Armstrong McCall products. The trial court denied AMCO's motion for a preliminary injunction, concluding that because AMCO was no longer an

Armstrong McCall franchisee, AMCO could not establish either a probability of prevailing, or the potential for irreparable harm.

Armstrong McCall then filed a motion for a preliminary injunction, without first having filed an answer or a cross-complaint. In its motion, Armstrong McCall requested that the court enjoin AMCO from using Armstrong McCall's trademarks and trade secrets, and from selling Armstrong McCall's beauty supplies.

On the day before the hearing on Armstrong McCall's motion for a preliminary injunction, Armstrong McCall filed a cross-complaint against AMCO. At the hearing, the trial court rejected AMCO's argument that Armstrong McCall's motion for a preliminary hearing was defective because Armstrong McCall had not been seeking any affirmative relief at the time it filed its motion. The court granted Armstrong McCall's motion and issued a preliminary injunction against AMCO.

On appeal, AMCO contends that the trial court abused its discretion in denying AMCO's request for a preliminary injunction because, AMCO claims, AMCO was likely to prevail on its claims, and faced irreparable harm if Armstrong McCall and SD Hair and their subsidiaries were permitted to sell Armstrong McCall products in the geographic territories over which AMCO had previously held exclusive distribution rights.

With respect to the trial court's order granting Armstrong McCall's request for a preliminary injunction, AMCO challenges the order on three grounds. First, AMCO complains that the trial court erred in granting Armstrong McCall's motion for a preliminary injunction on the ground that Armstrong McCall had not filed either a complaint or a cross-complaint before filing its request for a preliminary injunction.

According to AMCO, since there was no cross-complaint, the trial court granted a preliminary injunction "without a verified showing of irreparable harm," and thereby violated AMCO's due process rights because AMCO had no opportunity to address the merits of Armstrong McCall's claims. Second, AMCO complains that apart from the procedural defects of Armstrong McCall's motion for a preliminary injunction, the court abused its discretion in granting the motion because there was no showing that Armstrong McCall would be irreparably harmed if the court did not issue a preliminary injunction. Finally, AMCO challenges the language of the trial court's order, contending that the language "is overly broad and vague."

We conclude that the trial court did not abuse its discretion in denying AMCO's request for a preliminary injunction. We also conclude that the trial court did not err in entertaining Armstrong McCall's request for a preliminary injunction, because even if we were to agree with AMCO that Code of Civil Procedure section 527 requires that Armstrong McCall have been seeking affirmative relief by way of a cross-complaint in order to obtain a preliminary injunction, Armstrong McCall did file a cross-complaint prior to the hearing on the motion. Although Armstrong McCall filed its cross-complaint after it filed its motion for a preliminary injunction, this did not cause prejudice to AMCO. We further conclude that the trial court did not abuse its discretion in granting Armstrong McCall's request for a preliminary injunction. Finally, we narrowly modify the language of the trial court's preliminary injunction to comport with the relief that Armstrong McCall requested and that the trial court indicated it intended to grant.

II.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Armstrong McCall is a distributor of professional hair and beauty products made by various manufacturers. Armstrong McCall distributes its products throughout the southeastern and western United States through independently owned franchises. AMCO was an Armstrong McCall franchisee and served as the exclusive distributor of Armstrong McCall products in the northeastern region of San Diego County. The franchise relationship between AMCO and Armstrong McCall was governed by two contracts or franchise agreements, covering two different geographic regions. The franchise agreements included provisions that granted AMCO certain rights as a franchisee, as well as provisions for renewing the franchises every three years.

The franchise agreements permitted AMCO to sell certain Armstrong McCall beauty products only to qualified buyers. Qualified buyers included licensed cosmetologists, hair salons, and beauty schools. According to AMCO, by marketing and selling these products to qualified buyers and not to the general public, Armstrong McCall and the product manufacturers were able to "generate brand exclusivity" and thereby create increased demand for their "niche, high-end hair products."

AMCO alleges that in or about February 2007, it learned that other Armstrong McCall distributors and franchisees were engaging in a practice known as "diversion," which involves the selling of products to non-qualified buyers and retailers. According to

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1 Because of the procedural posture of this case, many of the "facts" we relate necessarily derive from the allegations in the parties' pleadings.

AMCO, Armstrong McCall and the manufacturers of the Armstrong McCall products had previously created industry-wide guidelines, procedures and rules to prevent the practice of diversion. Further, Armstrong McCall's franchise agreements expressly prohibited diversion. AMCO informed Armstrong McCall of its concerns about other franchisees engaging in diversion, but, AMCO alleges, Armstrong McCall "did nothing to stop or limit the ongoing diversion." AMCO believes that Armstrong McCall did not stop the diversion because Armstrong McCall, itself, was encouraging and engaging in product diversion.

After AMCO expressed its concerns to Armstrong McCall, the relationship between AMCO and Armstrong McCall deteriorated. Armstrong McCall suggested that AMCO had breached certain terms of the franchise agreements. AMCO disputed Armstrong McCall's allegations and responded to each of Armstrong McCall's asserted complaints through counsel.

AMCO's franchise agreements were set to expire on July 31, 2008. Earlier in July, Armstrong McCall gave AMCO the proposed renewal agreements, and indicated that the renewal agreements did not alter any material terms of the existing agreements. After reviewing the documents, AMCO concluded that there were, in fact, material changes to the agreements. Through its counsel, AMCO notified Armstrong McCall that it would not agree to the changes, and that it wished to renew its franchises pursuant to its rights under the Franchise Relations Act (Bus. & Prof. Code, § 20000, et seq.) (the Act).

According to AMCO, Armstrong McCall had failed to comply with the requirements of the Act with regard to franchise renewals.[2]

The parties did not sign renewal franchise agreements before the July 31 expiration of the franchise agreements. However, the parties disagreed, and continue to disagree, as to the legal effect of the July 31 date having passed without the parties signing renewal agreements. AMCO informed Armstrong McCall that it believed that Armstrong McCall's failure to meet the requirements of the Franchise Relations Act, including certain 180-day notice provisions, resulted in the automatic renewal of the recently-expired franchise agreements. Armstrong McCall took the position that AMCO's failure to sign renewal franchise agreements resulted in AMCO having only day-to-day franchises, which Armstrong McCall could terminate at any time, without cause. The parties do not appear to dispute the fact that AMCO continued to operate as an Armstrong McCall franchisee through most of August 2008.

[2] The Franchise Relations Act governs existing relationships between franchisors and franchisees (as opposed to the creation of a new franchise relationship). Among the subjects that the Act governs are requirements pertaining to the renewal, nonrenewal, and termination of franchises. One of the requirements that the Act imposes on franchisors is that the franchisor provide a franchisee with 180-days notice of the franchisor's intention not to renew the franchise. (Bus. & Prof. Code, § 20025 ["No franchisor may fail to renew a franchise unless such franchisor provides the franchisee at least 180 days prior written notice of its intention not to renew; and . . . ."].) The statute also requires that at least one additional circumstance out of certain enumerated circumstances be met before a franchisor may decline to renew a franchise. (Bus. & Prof. Code, § 20025, subds. (a)-(f).) AMCO contends that Armstrong McCall failed to provide it with 180-days notice, and also failed to meet the requirements in subdivision (f) of Business and Professions Code section 20025, which addresses situations in which franchisors and franchisees cannot reach an agreement as to changes or additions to the terms of a franchise agreement that are substantially similar to the terms the franchisor is customarily using to renew its franchises.

On August 25, 2008, Armstrong McCall sent a letter to AMCO notifying AMCO that Armstrong McCall was terminating its franchises.

On September 12, 2008, AMCO filed a verified complaint against Armstrong McCall and various other defendants in which it alleged 13 causes of action and sought declaratory and injunctive relief, as well as an accounting. Central to AMCO's complaints against Armstrong McCall and the other defendants was AMCO's allegation that Armstrong McCall had engaged in diversion and had permitted other franchisees to engage in diversion, thereby harming AMCO's business by diluting the value of the Armstrong McCall products that AMCO sold.

Among the allegations in AMCO's complaint is its contention that "[o]n August 25, 2008, . . . AMLP [i.e., Armstrong McCall] sent Plaintiff a letter of termination, therein notifying Plaintiff that AMLP was, effectively that day, terminating Plaintiff's Franchise rights and would accordingly contact Plaintiff to arrange for AMLP's repurchase of Plaintiff's inventory." AMCO contends that Armstrong McCall's "termination of the parties' Franchise agreement[s] on August 25, 2008, without cause, was a material breach of the contract by AMLP," and that "[a]s a result of AMLP's unlawful breach, Plaintiff has suffered millions of dollars in damages, the full amount of which has yet to be fully ascertained, and according to proof at trial."

AMCO also asserts that it is entitled to a variety of forms of injunctive relief that would prohibit the defendants from selling and/or distributing Armstrong McCall products, or from impinging on Armstrong McCall's right to distribute those products (which would indirectly impinge on Armstrong McCall's franchisees' rights to distribute the products). In requesting this injunctive relief, AMCO appears to presume that it continues to be an Armstrong McCall franchisee and/or continues to have franchise rights. For example, AMCO alleges that "pursuant to the exclusive territorial distribution rights purchased by, and thereafter assigned to Plaintiff from AMLP, Plaintiff is entitled to an immediate injunction from the Court preventing AMLP, BSG, Sally, SD Hair, Voticky or their assigns from selling any AMLP distributed products within Plaintiff's exclusive distribution territories." However, the complaint does not include any allegation that Armstrong McCall's termination of AMCO's franchises was ineffective such that AMCO remains an Armstrong McCall franchisee, nor does it include a request that the court reinstate AMCO as an Armstrong McCall franchisee as a remedy for Armstrong McCall's alleged breach of the franchise agreements. In other words, AMCO nowhere alleges that it continues to be an Armstrong McCall franchisee. Nor does AMCO seek specific performance under the franchise agreements as a remedy for the alleged breach. Rather, as noted above, AMCO claims that Armstrong McCall breached the agreements by terminating the franchises and that as a result, AMCO has suffered monetary damages.

On September 18, Armstrong McCall entered into an agreement with defendant SD Hair in which Armstrong McCall made SD Hair its exclusive distributor in the franchise territories that had previously been AMCO's. Prior to this time, SD Hair had been an Armstrong McCall franchisee in other geographic regions in the San Diego area.

On September 25, AMCO filed a document entitled "PLAINTIFF'S EX PARTE APPLICATION FOR PRELIMINARY INJUNCTION, OR IN THE ALTERNATIVE

TEMPORARY RESTRAINING ORDER AND ORDER SHORTENING TIME." AMCO sought to enjoin Armstrong McCall, SD Hair, and other defendants from "contacting, selling or soliciting any customer of Plaintiff located within its exclusive distribution territory . . . ." In support of the motion, AMCO filed the declarations of Julie Yang, one of AMCO's owners, and Nathan Sheridan, AMCO's attorney.

The following day, the trial court denied AMCO's request for a temporary restraining order "for failure to show the prerequisite good cause," but issued an order to show cause (OSC) as to why a preliminary injunction should not be issued. The court set the OSC hearing for October 17, and established an abbreviated briefing schedule. Under the court's briefing schedule, AMCO was to file any additional supporting papers by September 29, defendants were to file any opposition papers by October 10, and any reply was due by October 15.

AMCO did not file any additional supporting papers. Armstrong McCall filed its opposition papers on October 10. In support of its opposition, Armstrong McCall filed the declaration of Neil Riemer, Armstrong McCall's president.

SD Hair filed its opposition to AMCO's request for a preliminary injunction on October 14. That same day, AMCO notified the parties that its motion for a preliminary injunction, which had been set to be heard on October 17, had been continued to October 24 and would be heard by a different judge.

The trial court held the hearing on AMCO's motion for a preliminary injunction on October 24. The court denied the motion, stating:

> "In this case, Plaintiff is seeking a preliminary injunction enjoining Defendants . . . from contacting, selling or soliciting any customer of Plaintiff located within its exclusive distribution territory, as set forth within the Verified Complaint. Plaintiff is seeking similar relief via the complaint. However, Plaintiff cannot show a probability of prevailing on the merits on the relief sought. Plaintiff has not provided any legal grounds for preventing Armstrong [McCall] from selling or soliciting customers of Plaintiff in the distribution territory. In fact, because Armstrong [McCall] terminated the Franchise Agreements, wrongfully or rightfully, Plaintiff no longer has a distribution territory. Neither is Plaintiff requesting reinstatements of the Franchise Agreements. Therefore, Plaintiff has not shown a probability of prevailing on the merits. Moreover, Plaintiff has failed to show an irreparable harm. Damages would provide a sufficient remedy."

On November 5, Armstrong McCall apparently filed an ex parte application for a temporary restraining order and preliminary injunction against AMCO, seeking an order requiring AMCO to return various documents related to Armstrong McCall's trade secrets, to assign its telephone number to Armstrong McCall, and to sell its Armstrong McCall inventory to Armstrong McCall.[3] On November 6, the trial court ordered that Armstrong McCall's "motion for TRO/Preliminary Injunction" would be heard on November 14, and ordered Armstrong McCall to file its moving papers by November 7. Armstrong McCall filed moving papers requesting a preliminary injunction against AMCO on November 7.

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3 The record does not include Armstrong McCall's ex parte application for a temporary restraining order and preliminary injunction. However, the declaration of Debbie Mauldin, which appears to have been filed in support of the application, is in the record, as is the trial court's order regarding that application.

AMCO filed its opposition to Armstrong McCall's motion for a preliminary injunction on November 12.[4] AMCO argued that Armstrong McCall could not seek a preliminary injunction without first filing or serving a pleading seeking affirmative relief against AMCO. That same day, Armstrong McCall filed its reply to AMCO's opposition, and also filed a cross-complaint against AMCO in which it alleged causes of action for breach of contract, breach of guaranty, breach of promissory notes, money lent, claim and delivery, trademark infringement, dilution, conversion, and unfair competition.

On November 14, 2008, the trial court issued a minute order in which it granted Armstrong McCall's motion for a preliminary injunction. The court stated, "Defendant has shown a probability of prevailing on its cross-complaint. Its franchise[s] . . . with plaintiff were terminated on August 25, 2008, however, plaintiff continues to use defendant's mark and customer lists. Plaintiff also has not returned defendant's operations manual. Plaintiff still retains some of defendant's inventory and has sold inventory without remitting payment to defendant." The court enjoined AMCO from the following activities:

> "(1) Using Armstrong McCall's federally registered trademarks [Armstrong-McCall and Armstrong McCall] or any colorable imitations;

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4 Although the clerk's stamp on AMCO's opposition indicates that it was filed on November 12, 2008, the document was signed by AMCO's attorney on November 10. It appears that the opposition was served on Armstrong McCall sometime prior to November 12, since Armstrong McCall filed its reply brief addressing AMCO's arguments on November 12.

> "(2) Using Armstrong McCall's trade secrets consisting of its operations manual, supplier information, advertising, business strategies and customer lists;
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> "(3) Selling Armstrong McCall's inventory in plaintiff's possession worth approximately $331,406;
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> "(4) Destroying, moving, concealing, distributing or disposing of any documents relating to Armstrong McCall trade secrets and sales of its inventory; and
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> "(5) Assisting, aiding or abetting any other person or business entity in engaging in any of the activities prohibited in paragraphs 1-4."

On November 18, the trial court signed a proposed order with terms similar to the terms outlined in the trial court's minute order. Specifically, the November 18 order states:

> "**IT IS ORDERED** that, AMCO and its agents, employees, representatives, and all persons acting in concert or participating with it, is restrained and enjoined from engaging in or performing, directly or indirectly, any and all of the following acts:
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> "(1) using AMLP's federally registered trademarks, Armstrong-McCall and Armstrong McCall, or any colorable imitations thereof;
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> "(2) using AMLP's trade secrets including its operations manual, supplier information, training methods, merchandising, advertising, marketing, and sales research, operating procedures, business strategies, and customer lists;
>
> "(3) selling AMLP's inventory in AMCO's possession;
>
> "(4) destroying, moving, concealing, distributing or otherwise disposing of any documents, relating to AMLP's trade secrets and sales of its inventory; such documents shall consist of any writings, correspondence, notes, books, electronically stored information, e-mail messages, memoranda, invoices, purchase orders receipts, pamphlets, reports, account books, rolodex information, calendars, photographs, slides, videotapes, films, drawings, sketches, illustrative materials, magnetic recording tapes, computer records or

> data, web sites, microfilm and other storage means by which information is retained in retrievable form, and all other materials whether printed, typewritten, handwritten, recorded or reproduced by any process and whether in final or draft form[.]"

Armstrong McCall filed a notice of entry of the preliminary injunction order on November 20, 2008.

On December 8, 2008, AMCO filed a timely notice of appeal from the trial court's orders of October 24 (denying AMCO's request for a preliminary injunction) and November 18 (granting Armstrong McCall's request for a preliminary injunction).

III.

DISCUSSION

AMCO challenges both the trial court's denial of its request for a preliminary injunction, and the court's granting of Armstrong McCall's request for a preliminary injunction. With respect to the first order, AMCO contends that the trial court abused its discretion in failing to issue a preliminary injunction enjoining Armstrong McCall from using AMCO's customer lists and/or informing AMCO's customers that SD Hair was Armstrong McCall's exclusive distributor. According to AMCO, the "status quo was that [AMCO] was continuing to operate its business based on the automatic renewal of the franchise agreement pursuant to the Franchise Relations Act." AMCO contends that "[t]he ultimate issue of termination – rightfully or wrongfully – was beyond the scope of the inquiry, an issue which should be decided by the trier of fact."

With respect to the trial court's order enjoining AMCO from using Armstrong McCall's trademarks and trade secrets and selling Armstrong McCall's products, AMCO presents three arguments. First, AMCO challenges the procedural correctness of Armstrong McCall's motion, contending that the trial court misinterpreted and misapplied the Code of Civil Procedure when it permitted Armstrong McCall to pursue its request for a preliminary injunction. AMCO asserts that Armstrong McCall's motion for a preliminary injunction was defective because it was filed before Armstrong McCall had sought any affirmative relief against AMCO in the trial court. AMCO further argues that the timing of Armstrong McCall's filing of its cross-complaint—which was filed the day before the hearing on Armstrong McCall's motion for a preliminary injunction—prevented AMCO from having the opportunity to adequately address the allegations in the cross-complaint.

Second, AMCO contends that the trial court abused its discretion in granting Armstrong McCall's motion for a preliminary injunction. AMCO asserts that Armstrong McCall failed to plead any injury for which a preliminary injunction was required and failed to demonstrate irreparable harm.

Third, AMCO argues that the preliminary injunction order that the trial court ultimately issued should be reversed because it is vague and ambiguous. According to AMCO, although in its motion for a preliminary injunction Armstrong McCall sought to enjoin AMCO from selling only certain goods worth $331,406, the court's order restrains AMCO from "selling AMLP's inventory in AMCO's possession," with no dollar figure included in the order.

A. *Legal standards for preliminary injunctions*

"The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73.) "[A]s a general matter, the question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 554.)

Ordinarily, we review an order granting a preliminary injunction for an abuse of discretion. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1136.) "Of course, questions underlying the preliminary injunction are reviewed under the appropriate standard of review. Thus, for example, issues of fact are subject to review under the substantial evidence standard; issues of pure law are subject to independent review." (*Id.* at pp. 1136–1137.)

B. *The trial court did not abuse its discretion in denying AMCO's request to enjoin Armstrong McCall and SD Hair from selling Armstrong McCall products in AMCO's previous territories*

AMCO suggests that it "was continuing to operate its business based on the automatic renewal of the franchise agreement pursuant to the Franchise Relations Act," after July 31, 2008, and that a preliminary injunction was necessary to "protect" the geographic territories and AMCO's "right to continue to do business within these territories until a decision of the rights of the parties could be reached on the merits." According to AMCO, Armstrong McCall had "specifically agreed to refrain from engaging in commerce in [AMCO's] exclusive geographic territories through the franchise agreements," and the issue of whether Armstrong McCall's termination of AMCO's franchises was wrongful or not is an issue that "should be decided by the trier of fact."

Although the precise position that AMCO is taking is unclear from its briefing, as we read the record and AMCO's briefs, AMCO could be making two arguments with respect to its request for a preliminary injunction. First, AMCO may be contending that Armstrong McCall's termination of AMCO's franchises was not effective, due to Armstrong McCall's failure to comply with the Franchise Relations Act in terminating the franchises. On this basis, AMCO might be arguing that it is still an Armstrong McCall franchisee, and that the court should therefore have granted AMCO's motion for a preliminary injunction and enjoined Armstrong McCall from giving AMCO's franchise rights to another party or otherwise interfering with AMCO's franchise territories. Alternatively, AMCO might be contending that it is no longer an Armstrong McCall franchisee because Armstrong McCall's termination of the franchises, while a breach, was effective. Under this theory, AMCO appears to argue that, for equitable reasons, the trial court should have restrained Armstrong McCall from doing business in AMCO's former franchise territories and should have permitted AMCO to continue to do business there, albeit not as an Armstrong McCall franchisee.

Neither of these positions is tenable under AMCO's pleadings. The first would require that AMCO allege that Armstrong McCall's termination of AMCO's franchises was not effective. However, AMCO has not made this allegation. In fact, AMCO alleges that the franchise termination occurred, that it constituted a breach, and that AMCO is entitled to significant monetary damages as a result of the breach ─ thus implicitly conceding that the termination was effective. The second appears to be a request for a remedy that could be granted only if AMCO were seeking specific performance under the franchise agreements (i.e., reinstatement of the franchises) as a remedy for Armstrong McCall's alleged breach, which it is not.

1. *AMCO has not alleged that the termination was ineffective*

AMCO appears to suggest on appeal that Armstrong McCall's August 25 termination of the franchises was ineffective when it argues that "a central issue in this case is the termination or automatic renewal of the franchise agreements." However, this statement misconstrues the central issue in this case, as framed by the allegations in AMCO's complaint. Despite what AMCO may believe it has alleged in its complaint, AMCO has *not* alleged that the manner in which Armstrong McCall terminated the franchises on August 25 was somehow ineffective, and that as a result, the franchise agreements were automatically renewed. Rather, AMCO alleges that "automatic renewal" of the franchise agreements occurred when the parties failed to reach an agreement on different renewal terms as of the July 31 expiration date of the franchise agreements. Under this theory, Armstrong McCall's *subsequent* termination of AMCO's franchises on August 25—after the franchise agreements had automatically renewed—was a breach because it was done in violation of the terms of those renewed franchise agreements.

Although AMCO suggests otherwise in its briefing on appeal, it has *not* alleged that Armstrong McCall did not effectuate a termination of the franchises that AMCO claims were granted within the renewed agreements. Thus, contrary to AMCO's contention, the central issue in this case does not involve whether the franchise agreements were terminated or instead were automatically renewed. Rather, what is at issue in this case are two related, but distinct, questions regarding the automatic renewal of the franchise agreements and the subsequent termination of the franchises that were granted under those agreements. The first question raised by the allegations of AMCO's complaint is whether the agreements were automatically renewed by operation of law after they otherwise presumably expired—i.e., whether the parties were bound by the terms of the franchise agreements after July 31, for another three years. If the answer to the first question is yes, the second question raised by AMCO's complaint is whether Armstrong McCall breached the terms of those renewed agreements when it terminated AMCO's franchise rights 25 days after the franchise agreements had automatically renewed.

According to AMCO's complaint, the franchise agreements were in effect after July 31, and Armstrong McCall breached them on August 25 by terminating AMCO's franchises without cause. AMCO specifically alleges that Armstrong McCall is liable to AMCO for money damages as a result of this breach:

> "[AMLP's] termination of the parties' Franchise agreement[s] on August 25, 2008, without cause, was a material breach of the contract[s] by AMLP. As a result of AMLP's unlawful breach, [AMCO] has suffered millions of dollars in damages, the full

> amount of which has yet to be fully ascertained, and according to proof at trial."

Because AMCO alleges a breach by Armstrong McCall based on the termination, and does not otherwise allege that the termination was ineffective, AMCO has conceded that the termination of its franchises was effective.

2. *AMCO does not seek to be reinstated as an Armstrong McCall Franchisee and therefore cannot receive an injunction prohibiting Armstrong McCall from selling or distributing its products in AMCO's former franchise territory*

Despite its acknowledgement that Armstrong McCall terminated the franchises, AMCO nevertheless asserts in its complaint that it "is entitled to an immediate injunction . . . preventing AMLP, BSG, Sally, SD Hair, Voticky or their assigns from selling any AMLP distributed products within [AMCO's] exclusive distribution territories."

AMCO's position appears to be that because Armstrong McCall breached the franchise agreements by wrongfully terminating AMCO's franchises, Armstrong McCall should be enjoined from doing business in AMCO's former exclusive territories until the litigation has concluded.[5] However, AMCO has not articulated any legal theory that

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[5] This seems to be the same position that AMCO took in the trial court. For example, at the hearing on AMCO's motion for a preliminary injunction, AMCO's attorney engaged in the following colloquy with the court:

"THE COURT: [Y]ou're not precluded from doing whatever you're doing business-wise. And your remedy is damages; right? I mean, why — what — what would you want us to do at this time? Make them — you don't want to be their franchisee anymore anyway, is my understanding."

would allow a former franchisee to prevent a franchisor from continuing to do its business in a territory that used to be the exclusive territory of the former franchisee, after termination of the franchises. Armstrong McCall assigned to AMCO, as a franchisee, the exclusive rights to Armstrong McCall products in certain areas, and AMCO concedes

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"MR. SHERIDAN: That's my understanding, Your Honor, but let me preface it with this: That this was an asset which was unlawfully converted. In allowing the party who acted unlawfully and who in effect converted an asset of another without complying with ─ with the laws of the state of California ─

"THE COURT: But aren't you asking me to restrain their trade? You're telling me that they can't do the – deal with their own distributor and sell the product when you don't want to be with them anymore anyway; right?

"MR. SHERIDAN: Well, Your Honor, it ─ I mean, I'm asking the Court to exercise its equitable powers, which it has in this preliminary injunction setting –

"THE COURT: Okay.

"MR. SHERIDAN: ─ to not allow someone to convert an asset and then profit off of it. And I believe it's sanctioning that conversion and it's allowing them, and it's a motivation for them to do it to other franchisees. And there is authority allowing the Court to exercise that type of discretion.

"THE COURT: Well, I guess I'm unclear. What do you ─ let's say hypothetically I agreed with you. What would you want me to do?

"MR. SHERIDAN: Restrain them.

"THE COURT: From all business or ─

"MR. SHERIDAN: No. Just within the ─ within the territory which our clients own and had unlawfully converted.

"THE COURT: So you want me to say they can't do any business in your territory

"MR. SHERIDAN: No. I believe that the express language was that any of the clients that AMCOBeauty developed through its own time, effort, energy and resources over the course of 13 years and millions of dollars of investment capital, that they should be prohibited from doing business with those particular individuals. . . ."

that Armstrong McCall unilaterally terminated AMCO's franchises, thereby extinguishing AMCO's right to exclude Armstrong McCall, or others, from selling or distributing Armstrong McCall products in those territories. AMCO would have a viable claim for injunctive relief preventing Armstrong McCall from selling its products in AMCO's territories only if AMCO continued to be a franchisee. However, AMCO does not allege anywhere in its complaint that it is still a franchisee, or that Armstrong McCall should be ordered to specifically perform under the agreements by re-granting to AMCO the Armstrong McCall franchise rights and reinstating AMCO as a franchisee as a remedy for its alleged breach. In fact, in the trial court proceedings, AMCO's attorney expressly disavowed that AMCO wishes to continue to be an Armstrong McCall franchisee.

At the hearing, SD Hair's attorney offered this description of what AMCO appeared to be requesting: "At the end of the day, if I can read between the lines, it seems to be almost Plaintiffs want to punish Armstrong McCall saying, 'We don't want a relationship with you, but we don't want you to go into our area and do business here.'" This description does seem to aptly describe the position that AMCO is taking in this litigation. In effect, AMCO seeks to enforce against Armstrong McCall one provision of the franchise agreements—i.e., the part granting AMCO the exclusive right to sell and distribute Armstrong McCall products in certain territories, thereby prohibiting Armstrong McCall or others from also selling and/or distributing Armstrong McCall products in those territories—without enforcing the other provisions of the agreements that would establish a franchise relationship. In other words, AMCO wants to receive the major benefit of the franchise agreements without having to perform under the agreements, while also receiving monetary damages as a remedy for Armstrong McCall's alleged breach.

No such hybrid form of relief is available to AMCO. AMCO could have requested specific performance of the agreements, which would result in reinstating AMCO as a franchisee, in addition to requesting damages as the remedy for the wrongful termination of its franchises. If AMCO had requested both types of relief in its complaint, it would have had to elect one prior to judgment, since it may not receive both. (See *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 905 ["a party may not obtain both specific performance and damages for the same breach of contract"].) However, AMCO has requested only monetary damages – not specific performance.

The only circumstance under which AMCO would be entitled to the requested injunctive relief under a theory in which AMCO concedes that the franchise terminations occurred would be if AMCO were reinstated as a franchisee through the equitable remedy of specific performance. Because AMCO has not requested specific performance of the franchise agreements as a remedy for the alleged breach, and has, in fact, indicated that it does not want to continue to be an Armstrong McCall franchisee, AMCO is not entitled to the preliminary injunctive relief that it requested.[6]

AMCO has not alleged that Armstrong McCall's termination of the franchises was ineffective, and that AMCO thus continues to be a franchisee, or that it should be reinstated as an Armstrong McCall franchisee due to Armstrong McCall's breach. AMCO is thus no longer an Armstrong McCall franchisee, and AMCO has not sought to be declared to be or reinstated as an Armstrong McCall franchisee through this lawsuit. AMCO therefore cannot, through a request for injunctive relief, enforce rights that it previously had as a result of being a franchisee. The remedy that AMCO is pursuing is damages for a breach arising from wrongful termination of the franchises — damages to which it may be entitled. However, as stated above, AMCO cannot receive damages for breach of the franchise agreements based on a wrongful, but concededly effective,

6 At the most basic level, AMCO appears to be saying that Armstrong McCall wrongfully took AMCO's franchise rights, and that Armstrong McCall therefore owes AMCO the monetary value of those rights. AMCO is not asking to have those franchise rights returned to it. However, in addition to asking for the monetary value of the lost franchise rights, AMCO also wants to prevent Armstrong McCall from selling those same franchise rights to another party, at least until AMCO receives the monetary value of the franchise rights, pursuant to this lawsuit. There is no legal basis for restricting what Armstrong McCall does with the franchise rights that it took back from AMCO, whether wrongfully or rightfully, if the only remedy that AMCO is seeking is the monetary value of those rights, and not the rights themselves. AMCO can be made whole with monetary damages. There is thus no reason to prevent Armstrong McCall from selling those rights to another party, even as this litigation proceeds.

termination of the franchises *and* at the same time continue to benefit from the rights it possessed only by virtue of being a franchisee.[7]

The trial court thus properly concluded that AMCO did not show a probability of prevailing on a claim that would permit the relief AMCO was seeking through its request for a preliminary injunction, and that AMCO did not demonstrate that it would suffer

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[7] At oral argument, AMCO's counsel suggested that AMCO retains "general property" rights, independent of its franchise agreements with Armstrong McCall, on which it bases its contention that it is entitled to a preliminary injunction prohibiting Armstrong McCall and its franchisees from distributing Armstrong McCall products in AMCO's former territory. According to AMCO's counsel, these property rights derive from Armstrong McCall's previous business model, pursuant to which Armstrong McCall granted exclusive distributorships rather than franchises. AMCO purchased its predecessor's business, which involved an Armstrong McCall exclusive distributorship rather than a franchise. AMCO now maintains that its purchase of an exclusive distributorship gives it the right to its exclusive territory, independent of the subsequent franchise agreements. AMCO's counsel represented at oral argument that the complaint sets out facts that support its theory that it retains property rights that are independent of the franchise agreements. However, a footnote on the page of the complaint to which counsel referred the court appears to refute counsel's contention that AMCO retains some right to its former exclusive distribution territory, independent of its status as a franchisee. That footnote reads as follows:

"Plaintiff is uncertain of the exact date AMLP changed its business model from independent distributors to independent Franchisees – and whether the transition had occurred in, or prior to, 1996[.] *In any event, by 2001 or 2002 Plaintiff is certain that its distribution rights were governed by, and pursuant to, its acquisition of California Franchises duly registered by AMLP. For the purpose of this complaint, Plaintiff refers to its exclusive distribution/franchise rights as those of an AMLP Franchisee, whether, at the time referenced, it was operating as a distributor or designated AMLP Franchisee pursuant to ALMP's approval, registration and issuance of Franchises within the State.* In any event, all of the material allegations enumerated within the complaint, which, if proven, entitle Plaintiff to the recovery of its damages, occurred after Plaintiff's formal acquisition of the AMLP Franchises herein alleged." (Italics added.)

Even if AMCO did possess some independent property right in the exclusive distribution territory (despite its apparent disavowal that such rights exist independent of the franchise agreements), AMCO made no such allegation in its complaint. AMCO has failed to identify any legal right it might have to the exclusive distribution territory that does not derive from the franchise agreements.

irreparable harm in the absence of the preliminary injunction that it sought. Under these circumstances, the trial court acted within its discretion in denying AMCO's request for a preliminary injunction against Armstrong McCall and SD Hair.

C. *The trial court did not err or abuse its discretion in granting Armstrong McCall's motion for a preliminary injunction*

1. *The court did not err in considering and deciding Armstrong McCall's motion for a preliminary injunction despite AMCO's procedural challenges to the motion*

AMCO presents a number of propositions in challenging the procedural basis of the trial court's granting of a preliminary injunction in favor of Armstrong McCall. AMCO first contends that Armstrong McCall was required to have a verified pleading on file before it could request a preliminary injunction, and that in failing to have such a pleading on file, Armstrong McCall forfeited its right to seek or receive a preliminary injunction. Alternatively, AMCO appears to suggest that even if Armstrong McCall was not required to have a verified pleading (in the form of a cross-complaint) on file prior to filing a *request* for a preliminary injunction, Armstrong McCall was required to have on file a verified pleading in which it sought affirmative relief before the trial court could *grant* a preliminary injunction. AMCO further suggests that even if Armstrong McCall filed its cross-complaint in this case before the court granted Armstrong McCall's request for a preliminary injunction, the cross-complaint was filed so close in time to the hearing that AMCO had no opportunity to properly respond to the allegations of the cross-complaint.

Code of Civil Procedure section 527 provides the procedural framework for courts to follow in considering a request for preliminary injunctive relief:

> "(a) A preliminary injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. No preliminary injunction shall be granted without notice to the opposing party.
>
> "(b) A temporary restraining order or a preliminary injunction, or both, may be granted in a class action, in which one or more of the parties sues or defends for the benefit of numerous parties upon the same grounds as in other actions, whether or not the class has been certified.
>
> "(c) No temporary restraining order shall be granted without notice to the opposing party, unless both of the following requirements are satisfied:
>
> "(1) It appears from facts shown by affidavit or by the verified complaint that great or irreparable injury will result to the applicant before the matter can be heard on notice.
>
> "(2) The applicant or the applicant's attorney certifies one of the following to the court under oath:
>
> "(A) That within a reasonable time prior to the application the applicant informed the opposing party or the opposing party's attorney at what time and where the application would be made.
>
> "(B) That the applicant in good faith attempted but was unable to inform the opposing party and the opposing party's attorney, specifying the efforts made to contact them.
>
> "(C) That for reasons specified the applicant should not be required to so inform the opposing party or the opposing party's attorney.
>
> "(d) In case a temporary restraining order is granted without notice in the contingency specified in subdivision (c):
>
> "(1) The matter shall be made returnable on an order requiring cause to be shown why a preliminary injunction should not be granted, on

the earliest day that the business of the court will admit of, but not later than 15 days or, if good cause appears to the court, 22 days from the date the temporary restraining order is issued.

"(2) The party who obtained the temporary restraining order shall, within five days from the date the temporary restraining order is issued or two days prior to the hearing, whichever is earlier, serve on the opposing party a copy of the complaint if not previously served, the order to show cause stating the date, time, and place of the hearing, any affidavits to be used in the application, and a copy of the points and authorities in support of the application. The court may for good cause, on motion of the applicant or on its own motion, shorten the time required by this paragraph for service on the opposing party.

"(3) When the matter first comes up for hearing, if the party who obtained the temporary restraining order is not ready to proceed, or if the party has failed to effect service as required by paragraph (2), the court shall dissolve the temporary restraining order.

"(4) The opposing party is entitled to one continuance for a reasonable period of not less than 15 days or any shorter period requested by the opposing party, to enable the opposing party to meet the application for a preliminary injunction. If the opposing party obtains a continuance under this paragraph, the temporary restraining order shall remain in effect until the date of the continued hearing.

"(5) Upon the filing of an affidavit by the applicant that the opposing party could not be served within the time required by paragraph (2), the court may reissue any temporary restraining order previously issued. The reissued order shall be made returnable as provided by paragraph (1), with the time for hearing measured from the date of reissuance. No fee shall be charged for reissuing the order.

"(e) The opposing party may, in response to an order to show cause, present affidavits relating to the granting of the preliminary injunction, and if the affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. On the day the order is made returnable, the hearing shall take precedence over all other matters on the calendar of the day, except older matters of the same character, and matters to which special precedence may be given by law. When the cause is at issue it shall be set for trial at the earliest possible date and shall take precedence over all other cases, except older matters of the same character, and matters to which special precedence may be given by law.

"(f) Notwithstanding failure to satisfy the time requirements of this section, the court may nonetheless hear the order to show cause why a preliminary injunction should not be granted if the moving and supporting papers are served within the time required by Section 1005 and one of the following conditions is satisfied:

"(1) The order to show cause is issued without a temporary restraining order.

"(2) The order to show cause is issued with a temporary restraining order, but is either not set for hearing within the time required by paragraph (1) of subdivision (d), or the party who obtained the temporary restraining order fails to effect service within the time required by paragraph (2) of subdivision (d).

[¶] . . . [¶]

"(h) As used in this section:

"(1) 'Complaint' means a complaint or a cross-complaint.

"(2) 'Court' means the court in which the action is pending."

According to AMCO, the Code of Civil Procedure should be interpreted as requiring that a party assert a cause of action and pray for affirmative relief before it may move for a preliminary injunction. AMCO contends that because Armstrong McCall did not have an "affirmative prayer for relief" on file in the case "when it moved for a preliminary injunction," Armstrong McCall's motion should be "barred . . . as a procedural matter."

Based on the text of the statute, we reject AMCO's contention that Armstrong McCall is procedurally barred from obtaining a preliminary injunction because it did not have a verified pleading on file before it sought the preliminary injunction. Even if we presume that the relevant provisions of the Code of Civil Procedure require that a party have on file a verified pleading (i.e., either a complaint or a cross-complaint) in order to receive the benefit of a preliminary injunction, those provisions do not address *when* the verified pleading must be filed in relation to the party's filing a request for a preliminary injunction. Rather, Code of Civil Procedure section 527 discusses the prerequisites to the court *granting* preliminary injunctive relief. (§ 527, subd. (a) ["A preliminary injunction *may be granted* at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor." (Italics added.)].) The provision does not address whether a party seeking affirmative relief must have filed a pleading prior to seeking a preliminary injunction. We therefore decline to hold that a party who requests a preliminary injunction without having previously filed a pleading for affirmative relief is barred from obtaining a preliminary injunction.[8]

AMCO's second proposition — "that some cause of action must exist before injunctive relief may be granted"—offers AMCO no relief, either, since Armstrong McCall did file a cross-complaint before the trial court granted Armstrong McCall's

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8 Although AMCO suggests in a single sentence that this raises an issue of Armstrong McCall's "standing" to seek a preliminary injunction, AMCO offers no authority for such a proposition, and we do not view the issue as one implicating standing.

request for a preliminary injunction. We therefore need not determine whether a cross-complaint must be filed in all cases, as AMCO argues, before the court may grant a defendant's request for a preliminary injunction.[9]

AMCO also argues that although Armstrong McCall may have "technically" had a cross-complaint on file before the court granted its request for a preliminary injunction, it filed the cross-complaint *after* AMCO had filed its opposition to Armstrong McCall's motion for a preliminary injunction, and only one day before the hearing on the motion. AMCO contends that, as a result, it "had no reasonable opportunity to present evidence to contradict the unverified allegations of the cross-complaint" and "could not address the merits of ALMP's claims" in opposing Armstrong McCall's request for a preliminary injunction.

We conclude that even presuming that Armstrong McCall was required to have a cross-complaint seeking affirmative relief on file before it could obtain a preliminary injunction, AMCO was not prejudiced by the trial court's decision to grant the preliminary injunction despite the fact that Armstrong McCall filed its cross-complaint

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9 AMCO argues that because subdivision (h) of section 527 provides that the word "[c]omplaint" in the provision means "complaint or cross-complaint," the legislature must have intended that a grant of a preliminary hearing be based on either a complaint or a cross-complaint only, and does not provide for preliminary injunctive relief in the absence of a complaint and/or cross-complaint. AMCO further supports this position by contending that the case law establishes that "a motion for a preliminary injunction is sought by a plaintiff or cross-complainant." However, section 527, subdivision (a) identifies not only a "complaint" but also "affidavits" as potentially providing the grounds for granting a preliminary injunction: "A preliminary injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor."

after AMCO filed its opposition to the motion for preliminary injunction, and on the day before the hearing on the motion.

Contrary to AMCO's position on appeal, Armstrong McCall did make a "verified" showing of irreparable harm, and AMCO had an opportunity to adequately address the allegations that formed the basis of Armstrong McCall's request for a preliminary injunction. Armstrong McCall's allegations were set out in the verified declarations that it filed in support of its request for a preliminary injunction, which was served on AMCO on November 7 — seven days before the hearing. AMCO thus was aware of the grounds on which Armstrong McCall was seeking a preliminary injunction well before Armstrong McCall filed its cross-complaint. It was clear from the declarations that Armstrong McCall was asserting that AMCO was no longer a franchisee, and that it had therefore lost its rights to hold and use Armstrong McCall's trade marks and secrets, as well as its rights to sell Armstrong McCall products. AMCO had the opportunity to present evidence to contradict the evidence that Armstrong McCall offered through the declarations.[10]

AMCO's own pleadings set forth the factual basis for Armstrong McCall's request for a preliminary injunction. AMCO alleges that Armstrong McCall terminated AMCO's franchises in breach of the franchise agreements. It is thus apparent from AMCO's

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10 AMCO did not formally request a continuance of the hearing on Armstrong McCall's motion for a preliminary injunction.

complaint that both parties agree that the franchises were terminated.[11] Further, as noted above, AMCO did not affirmatively seek reinstatement of the franchises in its complaint. AMCO's exclusive distribution rights have therefore been terminated.

Even if the trial court had not decided the issue on the day of the hearing, but instead, had given AMCO additional time to brief the issues and/or file its own declarations in response to the allegations in Armstrong McCall's cross-complaint, it is clear that the court would have reached the same decision. The court so indicated to AMCO in response to AMCO's argument that it should be given more time to respond on the merits of the request. The court based its ruling on the fact that AMCO had not alleged that it continued to be an Armstrong McCall franchisee, and in fact disavowed any desire to be reinstated as a franchisee. No additional declarations could have changed these facts. Further, although AMCO contended that there were "issues regarding [Armstrong McCall's] ownership of the trademarks," this would not change the fact that AMCO's right to use those trademarks was based on its status as a franchisee, which had been terminated. In the absence of a continued franchise relationship, AMCO had no right to use the marks in question.

AMCO was thus not prejudiced by the manner in which Armstrong McCall moved for a preliminary injunction, or by the fact that the trial court considered the motion on its merits only one day after Armstrong McCall filed a cross-complaint.

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11 Again, the parties' real dispute appears to center not on whether a termination of the franchises occurred, but, rather, whether the franchise agreements were renewed pursuant to the Franchise Relations Act and, if so, whether Armstrong McCall complied with the terms of the franchise agreements in terminating the franchises.

2. *The trial court did not abuse its discretion in granting Armstrong McCall's motion for a preliminary injunction*

AMCO contends that the trial court abused its discretion in issuing a preliminary injunction in favor of Armstrong McCall. According to AMCO, Armstrong McCall made no showing of irreparable harm. AMCO suggests that the fact "that the franchise agreements were terminated" is "not a proper basis upon which to grant a preliminary injunction" because the court's decision "weighed on the ultimate rights in controversy," which, AMCO claims, involve the issue of "the termination or automatic renewal of the franchise agreements."

AMCO itself acknowledges, however, that Armstrong McCall did indeed terminate the franchises as of August 25, 2008. While the question whether the agreements were automatically renewed by operation of law as of August 1, 2008, is at issue in this case, an affirmative answer to that question would not change the fact that Armstrong McCall terminated the franchises on August 25, 2008. If the question whether the franchise agreements were automatically renewed for another three years is ultimately decided in AMCO's favor, that would mean that Armstrong McCall would be liable to AMCO for breaching the franchise agreements. The trial court acknowledged that Armstrong McCall may, in fact, be liable to AMCO for breach of the franchise agreements. However, the court properly determined that in making the argument that Armstrong McCall breached the franchise agreements, and in neither arguing that those agreements remain in effect, nor requesting specific performance of those agreements, AMCO necessarily accepts that the franchises have been terminated.

The franchise agreements provide for what is to happen between the parties once a franchise has been terminated. For example the franchise agreements provide:

> "On the termination or expiration of this Agreement, Distributor [i.e., AMCO] shall not use the Marks in any manner and shall remove and destroy all signs and other designs and insignia containing the Marks, the name "Armstrong McCall," or any likeness thereto or any derivation thereof and all other material that might suggest that the Distributor is the distributor of AMLP; Distributor must assign to AMLP all rights, title and interest in and to Distributor's telephone number and must notify the telephone company and all telephone directory publishers of the termination or expiration of Distributor's right to use any telephone numbers and any telephone directory listing associated with any Mark and authorize the transfer thereof to AMLP or its designee at AMLP's direction."[12]

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12 Although the franchise agreements discuss the "termination or expiration" of the agreements themselves, the nature of the contracts demonstrates that the terms "termination" and/or "expiration" refer to a particular portion of the agreements—the portion in which Armstrong McCall grants AMCO the right to engage in the business of selling goods as an Armstrong McCall franchisee, and all the attendant rights that go along with that, such as the right to use Armstrong McCall's trademarks and trade secrets. However, the franchise agreements also impose duties on the parties that are triggered only upon the termination or expiration of those specific franchise rights. In other words, the agreements require action on the part of the franchisee, even after its franchise rights have been terminated or expired, as is evidenced by this provision in the contract. We have therefore referred to those portions of the franchise agreements that relate to the granting of the franchise rights, and which may expire or be terminated by the franchisor, as the "franchises," and the contracts as a whole, which include obligations and rights that are triggered only upon the expiration or termination of the franchises, as the "franchise agreements." This interpretation comports with the statutory definition of "franchise" as "a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which: [¶] (a) A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and [¶] (b) The operation of the franchisee's business pursuant to that plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and [¶] (c) the franchisee is required to pay, directly or indirectly, a franchise fee." (Bus. & Prof. Code, § 20001, subds. (a)-(c).)

Another provision states:

> "Upon termination or expiration of this Agreement, Distributor undertakes and agrees to return to AMLP all copies of any manuals or materials and all other information or copies thereof containing any Trade Secrets or pertaining to the business of AMLP."

The franchise agreements also include a provision related to how any inventory remaining in AMCO's possession upon termination should be handled:

> "Upon termination or expiration of this Agreement, AMLP and Distributor shall examine and take an inventory of the Products remaining in the possession of Distributor. AMLP will repurchase from Distributor, and Distributor shall sell to AMLP, any or all Products in Distributor's inventory that AMLP deems, in its sole and absolute discretion, resalable . . . . Upon termination or expiration, Distributor shall deliver to AMLP all tangible and electronic copies of all materials containing any of the Trade Secrets, including, without limitation, the Operations Manual and Distributor's customer list and customer account information."

In establishing through verified declarations that AMCO did not comply with these provisions, Armstrong McCall made a showing of a likelihood of success on its claim that AMCO failed to perform as required upon termination of the franchises. "'Under basic contract principles, when one party to a contract feels that the other contracting party has breached its agreement, the non-breaching party may either stop performance and assume the contract is avoided, or continue its performance and sue for damages. Under no circumstances may the non-breaching party stop performance and continue to take advantage of the contract's benefits.' [Citation.]" (*Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437, 443-444 (*Jay Bharat*).) AMCO cannot avoid fulfilling its contractual duties under the agreements (i.e., its promise to return certain items to Armstrong McCall and to stop using Armstrong McCall's trademarks and trade secrets upon termination of the franchises), and at the same time, recover damages from Armstrong McCall for Armstrong McCall's alleged breach of the agreements.

Armstrong McCall demonstrated a likelihood of success on its claim that AMCO failed to perform under the franchise agreements by not returning to Armstrong McCall the products and information identified in the franchise agreements as being required to be returned upon termination. The court could therefore reasonably presume that Armstrong McCall would suffer irreparable injury if AMCO were permitted to continue to sell Armstrong McCall products and use Armstrong McCall trademarks and trade secrets despite no longer being an Armstrong McCall franchisee. (See *Jay Bharat, supra*, 167 Cal.App.4th at p. 444 [court could "presume irreparable injury" based on cross-complainant's showing of likelihood of success].) The court thus acted within its discretion in prohibiting AMCO from using and/or destroying Armstrong McCall's trademarks and trade secrets and from selling the Armstrong McCall products that it retained. (See *ibid*.)

3. *The trial court's signed order should be modified to conform to the court's stated intention at the hearing, as identified in the minute order affirming the court's tentative ruling*

AMCO challenges the language of the trial court's preliminary injunction order, claiming that the final order "is overly broad and vague." AMCO's only argument on this point is that the court's order "restrains [AMCO] from 'selling AMLP's inventory in AMCO's possession,'" despite the fact that Armstrong McCall's motion was more limited, seeking to enjoin AMCO from selling only "good[s] worth $331,406, to which title was disputed."

Although it is not clear that there are products in AMCO's possession beyond the inventory identified as "worth approximately $331,406," Armstrong McCall sought to enjoin AMCO only from "selling AMLP's inventory in AMCO's possession worth approximately $331,406" in its motion for preliminary injunction. In addition, the minute order in which the trial court announced the terms of the preliminary injunction provided that the court was enjoining AMCO from "[s]elling Armstrong McCall's inventory in plaintiff's possession worth approximately $331,406." It appears that it was the trial court's intention to grant Armstrong McCall only the preliminary relief that Armstrong McCall sought in its motion. Nevertheless, Armstrong McCall's proposed order, which the court ultimately signed, excluded the language that referred to the approximate dollar value of the Armstrong McCall inventory at issue.

Armstrong McCall offers no reason why the order should not be limited to the relief that it sought in its motion for a preliminary injunction, other than asserting that the "alleged ambiguity of an order is not a proper issue for appeal." Armstrong McCall cites to section 904.1 to support this contention, but that provision simply lists the types of orders and judgments from which an appeal may be taken. Armstrong McCall has provided no substantive reason why the trial court's order should not be modified to comport with the terms of Armstrong McCall's original request for a preliminary injunction, as well as with the court's stated intention, to include the limitation "worth approximately $331,406" with respect to the Armstrong McCall inventory in AMCO's possession that Armstrong McCall does not want AMCO to sell.[13]

To the extent that the order proposed by Armstrong McCall and signed by the trial court fails to limit the subset of Armstrong McCall inventory to which the injunction is to apply, we modify the trial court's order to enjoin AMCO from "selling AMLP's inventory in AMCO's possession worth approximately $331,406."

Because AMCO gives no other explanation as to the manner in which the trial court's order might otherwise be "overly broad and vague," we decline to make further modifications to the trial court's order.

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13 AMCO has not argued that the limitation "worth approximately $331,406" is itself vague and/or ambiguous. Rather, AMCO seems to take issue with the fact that the court's final signed order did not include this phrase.

IV.

DISPOSITION

The order of the trial court denying AMCO's motion for a preliminary injunction is affirmed. The order of the trial court granting Armstrong McCall's motion for a preliminary injunction is affirmed as modified.

AARON, J.

WE CONCUR:

McINTYRE, Acting P. J.

IRION, J.